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Supreme Court, U.S.  
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No. 89-

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

COMBINED INSURANCE COMPANY OF AMERICA,  
*Petitioner,*  
v.

THOMAS AINSWORTH,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEVADA**

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## QUESTION PRESENTED

Does the Due Process Clause permit states to give juries unlimited discretion to award punitive damages without established standards on how those damages are to be measured?\*

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\* The caption names all parties to this case. Pursuant to Rule 28.1 of the Rules of this Court, the following is a list of all parent companies, non-wholly owned subsidiaries, and affiliates of Combined: Aon Corporation is the parent of Combined. Combined's affiliates and subsidiaries are Associated Home Life Insurance Company, FFRL Re Corp., Forth Financial Resources of Alabama, Inc., Lombard Ryan Dealer Services Limited, Nicholson Chamberlain Colls Limited, Production Life Insurance Company, Oak Brook Holding, Inc., and Comprehensive Health Consultants, Inc.

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*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEVADA

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The petitioner, Combined Insurance Company of America, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada, reinstating a \$5,939,500 punitive damage award in a \$9,600 insurance dispute and rejecting petitioner's contention that the award violates Due Process of Law.

OPINIONS BELOW

The Nevada Supreme Court issued two opinions. The first is reported at 104 Nev., Adv. Op. 92, 763 P.2d 673 (1988). The second is reported at 105 Nev., Adv. Op. 53, 774 P.2d 1003 (1989). Both are reprinted in the appendix. App. 1a, 60a. The trial court's order

granting judgment notwithstanding the verdict, which the Nevada Supreme Court reversed, is unpublished. App. 71a.

Remittitur issued the day the Nevada Supreme Court filed its second opinion, and the district court entered judgment against Combined in conformity therewith. App. 81a. The Nevada Supreme Court denied Combined's motion to recall remittitur and stay execution. On June 15, 1989, Justice O'Connor granted Combined's application for a stay of execution, conditioned on Combined posting a bond. App. 83a. After litigation over its amount and terms, the Nevada Supreme Court accepted the bond Combined tendered. App. 84a.

### JURISDICTION

The Nevada Supreme Court entered its original decision on October 26, 1988. Both petitioner and respondent filed timely petitions for rehearing, which were denied on May 19, 1989. This petition has been filed within ninety days of that date. Jurisdiction exists under 28 U.S.C. § 1257(a).

### CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

[N]or shall any State deprive any person of . . . property, without due process of law.

### STATEMENT OF THE CASE

This case presents much the same facts as *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), and *Bankers Life & Casualty Co. v. Crenshaw*, 486

U.S. 71, 108 S. Ct. 1645 (1988). It differs from them and from *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), however, in that it comes to the Court with the Due Process issue first having been debated before and resolved by the Nevada legislature and that state's highest court. The issue described as "important" in *Aetna*, 475 U.S. at 828, "worthy of the Court's attention," in *Bankers Life*, 108 S. Ct. at 1655 (O'Connor & Scalia, JJ, concurring), and expressly left open by *Browning-Ferris*, 109 S. Ct. at 2921, deserves to be decided. It is squarely and properly presented by this case.

#### A. The Facts.

Much as in *Bankers Life*, this case began as a dispute between an insurer and its insured over medical evidence of arteriosclerosis and coverage under a policy that insured against "accidents" but excluded injuries "caused or contributed to by disease." Combined's insured, Thomas Ainsworth, suffered a stroke while undergoing an angiogram. Relying on the advice of its outside medical consultant and statements by Mr. Ainsworth's physician in the original claim form, the company concluded that arteriosclerosis had caused the stroke. Combined viewed arteriosclerosis as a disease, and it denied Mr. Ainsworth's claim. It stood by its denial despite Mrs. Ainsworth's several supplemental submissions and requests for reconsideration. Finally, Combined offered to compromise the disputed claim at 20% of its face value, an offer the Ainsworths declined. The policy benefits at issue were \$9,600.

## B. The Trial Court's Judgment Notwithstanding The Verdict.

At the close of the evidence the trial judge denied Mr. Ainsworth's motion for a directed verdict, saying that whether his claim was covered by Combined's policies was an issue of fact for the jury to decide. After expressing some doubt about doing so, the trial judge overruled Combined's objection to giving the jury an instruction on punitive damages. She said:

I can think of a million reasons why I shouldn't do what I'm about to do, but I have to be cognizant of the purpose of the instruction for punitive damages, as well as the law that has been cited to me by the attorneys in this case . . . and I will find that the giving of a punitive damage instruction is appropriate, and I will give the instruction.

Her instruction correctly stated Nevada law. It advised the jury that to award punitive damages they had to find "oppression, fraud or malice, express or implied." Instruction No. 24, App. 188a; *see* Nev. Rev. Stat. § 42.010 (1988). App. 200a. The jury was further instructed:

The law provides no fixed standard as to the amount of such punitive damages but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

App. 188a. This language, drawn verbatim from Nevada's Pattern Jury Instructions, also correctly stated applicable Nevada law. Nev. J.I. 10.20 (Michie 1986); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973) (in Nevada, "the assessing of punitive damages is wholly subjective [; t]here are no

objective standards by which the monetary amount can be calculated"); *see also* Nev. Assembly Bill 307 (1989) (amending Nev. Rev. Stat. § 42.010, effective May 30, 1989, to limit punitive damages to three times actual damages or \$300,000, whichever is greater, *except in cases involving insurance bad faith, products liability, toxic or nuclear waste, or defamation claims*). App. 201a (hereafter, "A.B. 307").

The closing argument by Mr. Ainsworth's lawyer emphasized that Nevada law provides juries with "no fixed standards." He exhorted the jury that, under Nevada law, they act as the "conscience of the community" and must punish as they in their discretion see fit. App. 190a, 192a, 197a-198a.

We're dealing with one of the biggest corporations in America.

\* \* \*

You cannot punish an insurance company which has assets of \$1,400,000,000 by just taxing them a few thousand dollars or even a few hundred thousand dollars. They'll laugh all the way to the bank and say: Glad we got out of there, out of Reno, you know, without paying more. That's not going to deter them.

You have an opportunity in this case as the conscience of this community to set a standard and make it expensive to break that standard.

\* \* \*

So think your damage award for punitive damages will have the salutary effect not only



on people like Tom Ainsworth, but I think it will help the insurance industry as a whole, and root out this conduct. There's no other way to do it. There's no other mechanism that the law allows other than what you're going to be doing on this jury. There is no Attorney General, there's no President of the United States; Congress won't do it either. You do it or nobody does it.

App. 192a, 198a, 199a.

Financial information introduced in evidence showed that Combined's net income after taxes for the year was \$118,790,205. Mr. Ainsworth's lawyer told the jury that "a reasonable verdict for the punitive damages [would be] somewhere between one and ten percent of that." App. 198a. The verdict was not unanimous as to punitive damages; one juror dissented. The seven jurors who voted to award punitive damages, however, followed the lawyer's suggestion. The \$5,939,500 verdict represented exactly five percent of the figure the jury was told represented Combined's net income after taxes.

The trial judge granted judgment notwithstanding the verdict on the punitive damage claim. App. 71a. She held that Mr. Ainsworth had not presented sufficient evidence of "oppression, fraud or malice, express or implied," as defined in previous Nevada cases. Since this ruling was dispositive on the judgment n.o.v. motion, she did not address Combined's alternative argument that the punitive damages were excessive. The trial judge upheld the jury's compensatory damage award, which comprised the \$9,600 under Combined's policies, plus \$200,000 for emotional distress. Combined paid the compensatory



award, together with interest and costs, in full, \$234,000.

### C. The Proceedings In The Nevada Supreme Court.

#### 1. The Constitutional Issues.

Combined was the respondent in the Nevada Supreme Court, defending a judgment in its favor. It tendered both state and federal law grounds in support of the judgment, as it was entitled to do.<sup>1</sup> The company squarely presented its Due Process challenge to reversal of the trial court's judgment to the Nevada Supreme Court:

Would reversal of the lower court's judgment n.o.v. and reinstatement of the jury's disproportionate punitive damage verdict, rendered on insufficient evidence and unconstitutionally vague instructions, result in a denial of Combined Insurance Company of America's right to Due Process of Law and the imposition of an Excessive Fine, in

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<sup>1</sup> The Nevada Supreme Court follows the rule, also adhered to by this Court, that it will affirm a legally correct judgment on any legitimate ground, whether addressed in the trial court or not. *Nelson v. Sierra Constr. Corp.*, 77 Nev. 334, 343, 364 P.2d 402, 406 (1961) ("[w]e have many times upheld the rule in this state that a correct judgment will not be reversed simply because it was based on a wrong reason"); *Goldsworthy v. Johnson*, 45 Nev. 355, 363, 204 P. 505, 507 (1922) ("[i]f the judgment is right upon any theory, even though it be upon one never thought of by the trial court . . . , it is our duty to affirm it"); *Long v. Flanigan Warehouse Co.*, 79 Nev. 241, 248, 382 P.2d 399, 403 (1963) (*dictum*); accord *Browning-Ferris*, 109 S. Ct. at 2921 n.23 (1989) ("[T]his is not a case in which respondent is making arguments in support of a judgment . . ."); *United States v. American Ry. Express*, 265 U.S. 425, 435-36 (1924).

derogation of the Eighth and Fourteenth Amendments to the United States Constitution?

Combined's Statement of Issues Presented for Review. App. 86a.<sup>2</sup> This followed state practice to the letter.<sup>3</sup> But Combined went further to apprise the state court of the importance of the federal questions presented.

The company briefed the constitutional issues extensively. App. 87a. Further, it moved to postpone oral argument until this Court decided *Bankers Life*, for guidance on the constitutional issues here. App. 108a. The court rejected that request. App. 130a. Prior to argument Combined supplemented its brief on the constitutional issues, pursuant to Nevada Rule of Appellate Procedure 31(d). App. 127a. After the case had been argued but remained undecided for more than a year, the court permitted Combined and Mr. Ainsworth to file supplemental briefs. App. 132a, 136a. Combined's supplement addressed the constitutional impact of the post-argument decisions in *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987), *Bankers Life*, and other authorities discussing the circumstances under which punitive damages are appropriate and limits on their amount. App. 132a-135a, 141a-144a.

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<sup>2</sup> In light of *Browning-Ferris*, Combined has abandoned its Eighth Amendment challenge.

<sup>3</sup> The Nevada Supreme Court is Nevada's only appellate court. Its rules do not provide for a formal "assignment of errors," but for a "statement of issues" by both appellant and respondent. See Nev. R. App. P. 28(b). The respondent's brief itself thus may be consulted as part of the jurisdictional record. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928).

Mr. Ainsworth opposed Combined on the merits of the constitutional questions. He urged *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Smith v. Wade*, 461 U.S. 30 (1983), as disposing of Combined's constitutional challenge. App. 102a-105a, 117a-123a, 125a-126a. He cited *Bankers Life* as an "affirmance" of punitive damages, App. 136a, 139a-140a, and pointed to the denials of certiorari in *Downey Savings & Loan Ass'n v. Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988), and *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988), as indicating "that the United States Supreme Court has clearly not shown an inclination to hold punitive damages unconstitutional." App. 138a-140a; *see also* App. 102a, 114-126a.<sup>4</sup>

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<sup>4</sup> Mr. Ainsworth also contended that Combined had not timely raised the constitutional issues, disregarding Combined's status as respondent and the Nevada Supreme Court's practice of routinely considering constitutional questions raised for the first time on appeal. *See, e.g., Natchez v. Board of Optometry*, 102 Nev. 247, 251, 721 P.2d 361, 363 (1986); *Summitt v. Nevada*, 101 Nev. 159, 161 n.2, 697 P.2d 1374, 1376 n.2 (1985); *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 643, 600 P.2d 1189, 1190-91 (1979), *cert. denied*, 445 U.S. 964 (1980); *Swartz v. Adams*, 93 Nev. 240, 563 P.2d 74 (1977); *Batesel v. Schultz*, 91 Nev. 553, 540 P.2d 100 (1975); *Lightenburger v. Gordon*, 89 Nev. 226, 510 P.2d 865, *cert. denied*, 414 U.S. 1039 (1973). This contention also was urged by Mr. Ainsworth in opposition to the stay entered by Justice O'Connor on June 15, 1989, pending the filing of this petition. Neither Justice O'Connor nor the Nevada Supreme Court accepted it. It should likewise be rejected by this Court. *See, e.g., Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979) (if a state court fails to

## 2. The Decisions of the Nevada Supreme Court Reinstating the Jury's Verdict and Directing the Entry of Judgment Against Combined.

*Ace Truck & Equipment Rentals, Inc. v. Kahn*, *supra*, is the Nevada Supreme Court's definitive re-statement of the state's punitive damage law. See generally *Lucas, Damages*, 53 Nev. St. B.J. 11-12 (Dec. 1988). In *Ace Truck* the Court canvassed its prior cases on punitive damages and announced that, from that date forward, it would review punitive damage awards to determine whether they are "clearly disproportionate" to the misconduct charged instead of whether they "shock the judicial conscience." 746 P.2d at 135-37 (emphasis in original). Verdicts that are "fair and just and reasonable" will be upheld; others will not. "The concept of what is fair and just and reasonable is a sense that most of us possess from childhood." *Id.* at 137. This formula permits consideration of "such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind." *Id.* (footnote omitted).

The Nevada Supreme Court held in this case that both the "clearly disproportionate" test in *Ace Truck*

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"indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim"). Mr. Ainsworth's "procedural bar," moreover, would not have been valid had it been directly invoked. See, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

and its earlier "shock the judicial conscience" test were satisfied in the jury's \$5.9 million verdict. App. 13a-15a, 67a-69a. Accordingly, it reversed the trial court's judgment n.o.v. It held deference due the jury's verdict required that "the evidence [be] interpreted in the manner most favorable" to "the party favored by [the] verdict [, who] gains the benefit of every inference of fact fairly deductible from the evidence." App. 63a. Judgment n.o.v. may not be granted, even in a punitive damage case, where there is "any substantial evidence" to support the verdict. App. 63a-64a. Justice Mowbray's concurring opinion on rehearing aptly describes the scope of judicial review accorded Combined in this case:

This case is a simple lawsuit.

It was tried to a jury and decided by a jury. The jury heard the evidence. The district judge properly charged the jury. At the conclusion of the presentation of the evidence the jury found in favor of appellant Ainsworth and awarded both compensatory and punitive damages. The evidence supports the jury's verdict.

Respondent, Combined Insurance Company of America, has presented nothing . . . that challenges in any way the integrity of the jury's verdict. Therefore, I would let the jury's verdict stand.

App. 44a.



### 3. The Rejection by the Nevada Supreme Court of Combined's Constitutional Claim Under the Due Process Clause.

Combined's federal constitutional claims were given scant attention by the Nevada Supreme Court, but there is no doubt they were decided, adversely to Combined. Combined had urged the court to consider *Aetna*, 475 U.S. at 828, and *Bankers Life*, 108 S. Ct. at 1651, 1654-56, particularly this Court's statements that the constitutional issues were "important" and "of moment and difficulty," and Justice O'Connor's concurring opinion in *Bankers Life*, where she stated her view that "there is reason to think" state laws that, like Nevada's, give "juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state . . . may violate the Due Process Clause." See App. 96a-100a, 132a-135a, 141-144a. Nevertheless the Nevada Supreme Court characterized Combined's contentions as "totally without merit." App. 69a.

Denying postponement of argument, the court had earlier expressed agreement with Mr. Ainsworth that "there is no indication the United States Supreme Court will overturn its prior decisions upholding the constitutionality of punitive damages" or that "the United States Supreme Court will actually decide any [constitutional] issues relevant" to this case. App. 130a-131a. In the court's second opinion (on rehearing) it said

[T]he major focus of Combined's argument in its briefs on appeal was that the verdict constituted an excessive fine or a violation of due process under the constitution.

App. 14a n.9. The court's second opinion went on to criticize Combined for having addressed the constitutional issues. *Id.* The court adverted to its original order denying postponement, observed that the statements made in that order were correct, and declared that Combined's objections to the rejection of its constitutional claims were "entirely frivolous and warrant our summary rejection." App. 21a.<sup>5</sup>

#### **D. The Proceedings Before The Nevada Legislature.**

The Nevada legislature meets only once every two years. Nev. Const. art. IV, § 2. In 1989 the issue of

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<sup>5</sup> While rehearing was pending, Combined moved to disqualify former Chief Justice Gunderson from the rehearing and for vacatur based on his participation in the original appeal. Combined's motion generated an extraordinary public response from Justice Gunderson. App. 150a. The basis of the motion was his relationships to and undisclosed dealings with the lawyers who opposed Combined in the case, including what Combined maintains was an illegal and unreported gift by one of them of a substantial interest in an FCC license venture to Justice Gunderson's wife. Although Justice Gunderson retired following the Court's first opinion, he was appointed a Senior Justice pursuant to Nev. S.C.R. 10. Whether because of Combined's motion or his retirement, Justice Gunderson did not participate in the rehearing. Although his disqualifying bias was not the pecuniary interest held violative of Due Process in *Aetna* but a personal, subjective one, it is mentioned because of the prominence of the disqualification proceedings in the court's second opinion. The proceedings also illustrate a central point: Without objective standards by which to verify the propriety of these multi-million dollar punitive damage awards, justice and the appearance of justice will never satisfactorily co-exist. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) ("to perform its high function in the best way justice must satisfy the appearance of justice") (citation omitted), quoted in *Aetna*, 475 U.S. at 825, and *Liljeberg v. Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988).

punitive damages and the need for objective limits on them was debated extensively. App. 204a-225a. The debate included discussion of the reasons for and against jury discretion in punitive damage cases, the constitutional issues identified by this Court in *Aetna*, *Bankers Life*, and *Browning-Ferris*, and the facts and law involved in this case.<sup>6</sup> The Nevada legislature's response was A.B. 307, which makes some procedural modifications to Nevada's punitive damage law and limits the amount of such damages that can be awarded in certain types of cases to three times compensatory damages or \$300,000, whichever is greater. App. 201a. However, it exempts from those limits cases involving insurance bad faith, products liability, defamation, and toxic or nuclear waste. These are the categories of cases in which objective limits are most needed.

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<sup>6</sup> Compare the testimony of Margo Piscevich, App. 206a (the *Ainsworth v. Combined* case illustrates the problem with punitive damages, in that "the \$5.9 million [awarded] bears no relationship to the harm caused" but appears to be tied exclusively to "the financial condition of [the] defendant") with the testimony of Lawrence Semenza, App. 209a (the *Ainsworth v. Combined* case illustrates how well the system is working: "[T]he question is what type of deterrent effect do you want. Is it going to be like a mosquito on the back of an elephant? Or, are you going to have hit somebody hard enough alongside the head . . . to get their attention? To get them back to reality. To know what's wrong. To make those corrections"). See also App. 217a.



## REASONS FOR GRANTING THE WRIT

### A. This Case Meets The Expressed Criteria Of This Court For Review Of The Constitutionality Of Disproportionate, Standardless Punitive Damage Awards.

In three cases in the last four years this Court has declined, for prudential or jurisdictional reasons, to consider the application of the Due Process Clause to punitive damage awards. *Browning-Ferris*; *Bankers Life*; *Aetna*. This case involves no such impediments to considering the Due Process issue on its merits. Both the Nevada Supreme Court and the Nevada legislature have expressly declined to place any limits on the discretion of a civil jury in this type of case to impose punitive damages in whatever amount it thinks best.

These actions by the state's highest court and the state legislature fulfill the prudential requirements of *Bankers Life*. Here, even after *Bankers Life*, the Nevada Supreme Court "resolve[d] the issue," *Bankers Life*, 108 S. Ct. at 1651, by declaring Combined's Due Process claims frivolous and unworthy of discussion. The legislature, with this case, *Bankers Life*, and *Browning-Ferris* before it, declined "to enact legislation addressing punitive damages for bad faith refusal to pay insurance claims," as suggested by this Court. *Id.* Mr. Ainsworth's counsel told the legislature that this Court "is not going to hold punitive damages unconstitutional" and that "the legislature must do what it has to do without addressing the outcome of the U.S. Supreme Court case." App. 218a. The next speaker addressed the opinion by Justice Marshall in *Bankers Life* and the constitutionality of punitive damages: "he [Justice Marshall] explicitly invited the

state legislators to address it." App. 205a. The legislature thereafter enacted A.B. 307, which excludes bad faith insurance actions from any limitation on punitive damages. App. 201a.

The Due Process issue presented by Combined has been exhaustively debated not only in Nevada but in other states as well. In the past year a number of state and federal courts have considered and summarily rejected Due Process challenges to unlimited punitive damage awards. These courts acknowledge this Court's statements in *Aetna*, *Bankers Life*, and *Browning-Ferris*, but take the Court's prior decisions, some of which Mr. Ainsworth cited to the Nevada Supreme Court, as adversely dispositive of constitutionality. *E.g.*, *Potomac Electric Power Co. v. Smith*, 79 Md. App. 591, 558 A.2d 768, 792 (1989) ("[w]hat the [United States] Supreme Court has declared constitutional we may not put asunder, consequently we hold in the case *sub judice* the award of punitive damages did not violate any aspect of the Constitution," citing *Day v. Woodworth*, *supra*, and *Curtis Publishing Co. v. Butts*, *supra*); see *Kraus v. Santa Fe Southern Pacific Corp.*, 1989 WL 71790 (9th Cir. July 3, 1989) ("Under current constitutional standards, the jury's discretion regarding punitive damages . . . is 'limited only by the gentle rule that [they] not be excessive,' " citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973)).<sup>7</sup>

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<sup>7</sup> Accord *Central Alabama Electric Cooperative v. Tapley*, 1989 WL 67556 (Ala. May 12, 1989) (not yet released for publication); *Olson v. Walker*, 1989 WL 71606 (Ariz. App. June 27, 1989); *Radell v. Comora*, 259 Cal. Rptr. 891 (Cal. App. July 21, 1989); *Miller v. Cudahy Co.*, 858 F.2d 1449, 1459 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 3265 (1989); *Fed. Dep. Ins. Corp. v. W. R.*

There is no reason to believe the law in this area will develop further without guidance from the Court. The question of "whether due process acts as a check on undue jury discretion to award punitive damages," *Browning-Ferris*, 109 S. Ct. at 2921, is irresolvable, given the current state of the law, unless and until this Court acts.<sup>8</sup>

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*Grace & Co.*, 691 F.Supp. 87, 97-102 (N.D.Ill. 1988), *aff'd in part and rev'd in part*, 877 F.2d 614 (7th Cir. 1989); *Kociemba v. G. D. Searle & Co.*, 707 F.Supp. 1517, 1535-36 (D.Minn. 1989); *Williams Pipe Line Co. v. City of Mounds View*, 704 F.Supp. 914, 921 n.7 (D.Minn. 1989); *Guy v. Commonwealth Life Ins. Co.*, 698 F.Supp. 1305, 1316 (N.D. Miss. 1988); *Leonen v. Johns-Manville Corp.*, 1989 WL 75938 (D.N.J. July 5, 1989); *Horowitz v. Schneider Nat'l, Inc.*, 708 F. Supp. 1573, 1578 (D.Wyo. 1989). The cases relied on by these courts for their unanimous rejection of the Due Process arguments advanced here include this Court's decisions in *Day v. Woodworth*, *supra*, *Curtis Publ. Co. v. Butts*, *supra*, and *Smith v. Wade*, *supra*, and the California decision in *Downey Savings & Loan Ass'n v. Ohio Casualty Co.*, 198 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988). The only exception to the cursory dismissal of Due Process challenges to punitive damages has been in the context of mass tort cases, which are *sui generis*. *In re School Asbestos Litig.*, 789 F.2d 996, 1002-05 (3rd Cir.), *cert. denied*, 479 U.S. 915 (1986); *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989); *Leonen v. Johns-Manville*, *supra*. These decisions overlook the fact that neither *Day v. Woodworth* nor *Curtis Publ. Co. v. Butts* considered whether Due Process permits discretionary punitive damages, or whether Due Process requires procedural safeguards in a punitive damage case. Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 Va. L. Rev. 269, 273-76 (1983) (the Court has not considered the procedural Due Process requirements of punitive damages).

<sup>8</sup> Issues similar to those presented by this petition are before the Court in *Jordan v. Clayton Brokerage Co.*, 861 F.2d 172 (8th Cir. 1988), *pet. for cert. filed*, 57 U.S.L.W. 3696 (March 8,

**B. Standardless Awards Of Punitive Damages Lead To Excessive Awards Wholly Disproportionate To The Offense Or Actual Damages That Give Rise To Them.**

The punitive damages in this case are four times the gross revenues Combined derived from its Nevada operations in 1986, six times the largest punitive damage award ever previously upheld by the Nevada Supreme Court, 618 times the policy benefits (contractual damages) involved, and 5,939 times the \$1,000 fine the Nevada legislature has specified for acts by insurers identical to those Combined was found guilty of having committed here. Nev. Rev. Stat. §§ 686A.183(a)(1), 686A.310 (\$1,000 per offense to maximum of \$10,000). Some states tie punitive damages to compensatory damages. See, e.g., Cal. Prob. Code § 10381 (West 1988) (fraudulent sale of decedent's property); *Bankers Life*, 108 S. Ct. at 1651 n.3. Nevada has rejected that restriction in cases involving insurers, both by statute and in judicial decision. See A.B. 307; Nev. J.I. 10.20 comment (Michie 1986).

"[E]ven where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,' *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)."

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1989) (No. 88-1483), *Longview Fibre Co. v. Jeannette Paper Co.*, 378 Pa. Super. 148, 548 A.2d 319 (1989), *pet. for cert. filed*, 58 U.S.L.W. 3021 (June 17, 1989) (No. 88-2051), and *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. 1988), *pet. for cert. filed*, 58 U.S.L.W. 3013 (June 8, 1989) (No. 88-1992).

*Browning-Ferris*, 109 S. Ct. at 2923 (Brennan & Marshall, JJ, concurring). This case presents the same issue.

**C. Standardless Awards Of Punitive Damages Deny Due Process Of Law To Targeted Defendants.**

The \$5,939,500 award in this case could as easily have been the \$3,500,000 amount awarded by an Alabama jury in *Aetna*, the \$1,600,000 amount awarded by a Mississippi jury in *Bankers Life*, or the \$22,500,000 chosen by another Reno, Nevada, jury in *Hires v. Republic Insurance Co.*, Case No. 87-2917, Second Judicial District Court in and for the State of Nevada, noted in Sella, *The 10 Largest Jury Verdicts of 1988*, 75 A.B.A.J. 45 (1989). These verdicts and many others manifest a system out of control.

Nothing in Nevada law warned Combined that by contesting coverage of Mr. Ainsworth's insurance policies it would commit a tort for which it would pay a penalty of almost \$6 million. In Nevada, as in many states, "the assessing of punitive damages is wholly subjective." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973); cf. *Bankers Life*, 108 S. Ct. at 1656 (O'Connor & Scalia, JJ, concurring). Even if Combined had intended to violate Nevada's punitive damages statute, Nev. Rev. Stat. § 42.010, it would have had no idea of the penalty for doing so. The punishment would have been left to the "wholly standardless discretion" of the jury, as it was here. This "appears inconsistent with due process." *Id*; see *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (consequences of violating a criminal statute should be stated); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (notwithstanding court-imposed standards for application of statute, jurors must



determine issue on their "notions of what the law should be," which violates Due Process). The law must enable citizens to conform their conduct to articulated requirements of the law and permit "meaningful judicial review." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). The law of punitive damages in Nevada does not permit either.

This case also confirms what is common knowledge—that "[a]wards of punitive damages are skyrocketing." *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor & Stevens, JJ, concurring and dissenting); M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* at vii, 14, 42 (Rand 1987) (in California between 1980 and 1984, the median punitive damage award in bad faith actions was \$336,000; the average was \$1.6 million; in Cook County, Illinois, "[t]he total amount of money awarded as punitive damages increased by 800% . . . during the 1980's, even after adjusting for inflation"). Combined is only one of many "targets" trying to cope with a system of punishment where guilt and penalty are adjudicated without reference to ascertainable standards.

The standardless instruction of juries on punitive damages exposes potential defendants to unconstrained sanctions based on their corporate status and their wealth. As one prominent plaintiff's attorney put it, "The wealth of the defendant should be the primary focal point of punitive damages." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in the Insurance Bad Faith Actions*, 13 U.S.F. L. Rev. 613, 634 (1979). "[P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

*Browning-Ferris*, 109 S. Ct. at 2923 (Brennan & Marshall, JJ, concurring). As the Nevada Supreme Court itself said twenty-seven years ago:

One cannot avoid thinking that the general rules offered to explain the reviewing court's decision [in a punitive damages case] are tailored to fit its feeling about the particular case before it. If that court does not approve the verdict it will state that the jury was motivated by passion or prejudice; or that a 'reasonable relationship' between the punitive and compensatory awards does not exist; or that the amount of the award is 'enormous.' On the other hand, the reviewing court in affirming the award may rely upon the converse of the reasons just mentioned, or upon a strong presumption in favor of the verdict as confirmed by the trial judge in refusing a new trial, or some other equally plausible statement. It is evident that such generalizations do not provide a workable standard in most cases.

*Miller v. Schnitzer*, 78 Nev. 301, 310, 371 P.2d 824, 829 (1962), criticized in *Ace Truck*, 746 P.2d at 136 (citations omitted).

*Ace Truck* notwithstanding, these statements in *Miller* remain true today. "[A]ppellate courts have no meaningful standard to apply in deciding whether to uphold punitive damages awards." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 290 (1983); see also Owen, *Civil Punishment and the Public Good*, 56 U.S.C. L. Rev. 103, 121 (1982) ("[a]s the law of punitive dam-

ages has been developed and applied, much in both fairness and efficiency has been left aside"). The "law" of punitive damages encourages juries to "punish without regard to the true harm threatened by a defendant's conduct." American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986); see Tort Policy Working Group, *An Update on the Liability Crisis* 47-52 (U.S. Dept. Justice 1987). Permitting juries to levy fines at will for the benefit of private plaintiffs under the "gentle rule that they not be excessive" does not advance a substantial state interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). Juries are invited to use "punitive damages . . . to punish unpopular defendants," *Int'l Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979), such as insurers who, in dealing with debatable claims, "have no easy task." *Aetna*, 475 U.S. at 821.

The essence of Due Process of Law is that it protects against governmental arbitrariness. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The present system of awarding punitive damages, in Nevada as in most of the United States, is justice by whim rather than by the rule of law. Defendants in civil cases are subject to awards that need bear no relation to any harm defendants may have inflicted and that cannot be meaningfully reviewed by appellate courts. Vast and unpredictable awards by lay jurors who are admonished only to "do what they think is best" are the epitome of arbitrariness. We have long since abandoned the notion of measuring justice by the Chancellor's foot—but at least the Chancellor, unlike members of juries, was learned in the law.



To hold that the Due Process Clause requires meaningful standards for punitive damages does not mean that this Court will have to review for excessiveness every award of punitive damages. It does not mean that the states are to be put in a straitjacket on what they may permit by way of punitive damages. The Due Process Clause does not impose on the states any particular rule about punitive damages. It says only that there must be some law by which they are measured and evaluated.

### CONCLUSION

There is much to be said for establishing a common, coherent starting point from which to continue the analysis and reform of a system that now permits unpredictable and unlimited punitive damages for vaguely defined misconduct. This Court "should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits" to provide the Due Process bedrock for that effort. *Bankers Life*, 108 S. Ct. at 1655 (O'Connor & Scalia, JJ, concurring). This case presents the Court with an unblemished opportunity to do so.

Respectfully submitted,

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